87 - 1248

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1987

NO. _____

WAYNE RONEK and ROGER RONEK,

Petitioner,
vs.

GALLATIN COUNTY,
MONTANA,

Respondents.

PETITIONERS' BRIEF

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MONTANA

LARRY JENT, ESQ.
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Attorney for Petitioner

73 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A COUNTY CAN ESCAPE LIABILITY UNDER 42 U.S.C. SECTION 1983, BY CLAIMING THE ABSOLUTE LIABILITY OF IT'S PROSECUTOR.

II

WHETHER A PROSECUTION FOR DEBT I.E., A CIVIL MECHANIC'S LIEN, IS A VIOLATION OF 42 U.S.C. SECTION 1983.

LIST OF ALL PARTIES

The caption of the case in this Court contains the name of all parties, except the Montana County Attorney's Association, amicus curiae in the proceeding below.

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The trial court's dismissal of the Petitioners' civil rights complaint against Respondent was affirmed by the Montana Supreme Court. 740 P.2d 1115, 44 St.Rptr. 1275 (July 29, 1987) Case No. 86-575. A copy of that opinion is printed at Appendix A, and completely sets forth the procedural history of this case.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Montana Supreme Court filed it's original opinion on July 29, 1987. The Plaintiffs' Petition for Rehearing, and the Order denying the rehearing was filed on August 26, 1987. On the 17th day of November, 1987, Justice O'Connor granted an extension of time to file certiorari until December 23, 1987. This Court's jurisdiction to review this matter by certiorari is invoked from 28

U.S.C. Section 1257(3).

STATUTES INVOLVED

42 U.S.C. Section 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, U. S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to searched, and the persons or things to seized.

Fourteenth Amendment, U. S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Thirteenth Amendment, U. S. Constitution Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

STATEMENT OF THE CASE

This is an action for damages brought in a Montana State trial court under the Civil Rights Act of 1871 (42

U.S.C. §1983). The case was dismissed under Rule 12(b)(6), M.R.Civ.P., by the trial court; the Montana Supreme Court affirmed, and this Petition for Certiorari followed.

The facts are surprisingly simple. This case arose out of a prosecution for debt. Wayne and Roger Ronek were arrested and jailed for felony theft, supposedly in violation of 45-6-301(2)(a), MCA. The text of the complaint read,

> Between the 1st day of June, 1982 and the 22nd day of October, 1982 the Defendants, acting in concert, committed the offense of theft (common scheme) a felony, when they purposefully or knowingly obtained by deception control over property of several owners with a purpose of depriving those owners of that property to wit:
>
> By offering to build and in fact building garages for Robert Montgomery, Dean Fraghly, and Steve Dayhuff, all of Bozeman, Montana and accepting payment in full for the construction of those

> garages. Failing to pay the material men (United Building Center, Simkins-Hallin Lumber Company, Tri-County Building Supply) for the materials furnished for the construction of the said garages resulting in liens being filed by the material men against Montgomery, Fraghly and Dayhuff in excess of One Hundred and Fifty Dollars ($150.00).

As a result of this complaint the Roneks were arrested and jailed and bail was set in the amount of Fifty Thousand Dollars ($50,000.00). They remained in jail for three days until their attorney filed a Writ of Habeas Corpus in the district court and obtained a reduction of bail and their release. The charges were subsequently dismissed by the county attorney; there was no independent judicial determination of probable cause either by preliminary hearing or by the filing of an information and affidavit in support thereof.

RAISING OF FEDERAL QUESTION

The federal questions concerning the immunity of a local government under 42 U.S.C. Section 1983 were initiated by the filing of an Amended Complaint in the trial court alleging a cause of action under that statute. The federal issues were briefed for the trial court by both parties and argued orally at the Motion to Dismiss. The trial court ruled on those issues and dismissed the complaint. Ronek vs. Gallatin County, 740 P.2d 1115, 44 St.Rptr. 1275, 1276, (1987).

In Montana, there is no intermediate appellate court. On appeal, the Montana Supreme Court also considered and ruled on the federal question of immunity for counties under 42 U.S.C. Section 1983, Ronek vs. Gallatin County, 740 P.2d 1115, 44 St.Rptr. 1275 (1987).

Those federal issues raised by Petitioners were: 1. Whether personal

immunity shields Gallatin County from an official capacity suit under 42 U.S.C. Section 1983; 2. Whether Gallatin County or the State of Montana is the proper party for suit for the acts of a county attorney in his official capacity under 42 U.S.C. Section 1983; 3. Whether Gallatin County may be held liable for the single act of a county attorney under 42 U.S.C. Section 1983.

The Court did not rule on whether the county attorney is a state or county official.

> The Court finds it unnecessary to confront the thorny problem of whether the county attorney in his prosecutorial capacity is an agent of either the county or the state in order to reach a decision in this case. Id, at 1277.

What the Court did hold was that Gallatin County was absolutely immune under Section 1983 from suit for any acts of the county attorney.

> The dispositive issue in this case is whether Gallatin County is the proper

> defendant, whether the charge is malicious prosecution or violation of Section 1983 of the Civil Rights Act. Ronek, at 1276.

Failing to recognize that this was a question of federal law, the Court decided the issue based on state law.

> When a prosecutor acts within the scope of his duties by filing and maintaining criminal charges he is absolutely immune from civil liability, regardless of negligence or lack of probable cause. State ex rel. Department of Justice, supra, at 92, 500 P.2d at 1330. The doctrine must encompass the state and its agencies, as well as the prosecutor, or its efficacy will be lost. . .
> We extend the holding in State ex rel. Department of Justice to include prosecutorial immunity for counties. Id, at 1277.

While prosecutorial immunity was the basis of the Court's holding that the county was immune, the Montana Supreme Court also in dictum discussed several other federal questions, chief among these being the requirement that a plaintiff in a Section 1983 allege a

policy or custom pursuant to Monell vs. New York City Department of Social Services, 436 U.S. 658, 56 L.Ed.2d 611 98 S.Ct. 2018 (1978). The Court did not discuss or rule on the application of Pembaur vs. Cincinnati, 475 U.S. ___, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986), which held a county liable for the single act of its prosecutor, although this case was presented to the Court (Brief of the Appellant p. 12, 14-17).

Finally, the Court, again in dictum, discussed the question of the nature of the violation alleged in the complaint. The Court did not rule nor discuss whether imprisonment for debt, standing alone, is a violation of the due process clause. While noting that the Complaint against the county alleged that the charge was brought without probable cause, Ronek vs. Gallatin County, 740 P.2d 1115, 44 St.Rptr. 1275, 1276, (1987), the Court inexplicably did

not understand, ". . . which of Roneks' constitutional rights were violated" Id, at 1279. The Complaint charges that they were prosecuted for civil debts. Under Rule 12(b)(6), M.R.Civ.P., all allegations of the complaint must be taken as true, Willson vs. Taylor, ___Mont.___, 634 P.2d 1180, 38 St.Rptr. 1606 (1981).

ARGUMENT

This Court should grant certiorari because the Montana Supreme Court's ruling below, which allowed a county to claim prosecutorial immunity as a shield from liability under Section 1983, conflicts with Owen vs. City of Independence, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). The ruling also conflicts with Pembaur vs. Cincinnati, 475 U.S. ___, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986); Kentucky vs. Graham, 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985) and with the Fifth Circuit Court

of Appeals in Crane vs. Texas. 759 F.2d 412 (5th Cir. 1985) on rehearing, 766 F.2d 193 (5th Cir. 1986). See, Rule 17.1(b), S.Ct.R. (both Crane and Pembaur held counties liable for civil rights violations by county prosecutors).

In addition, this Court has never ruled on whether absolute personal immunity of a local government officer, such as a prosecutor, shields the local government as well, although it has held that a municipality may not claim the qualified immunity of its officers. Owen vs. City of Independence, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980).

Petitioners do not concede, as asserted by the Montana Supreme Court that the prosecutor is absolutely immune in all cases; however, that issue need not be reached for a decision in this case.

On appeal, the Montana Supreme Court framed the dispositive issue as one of prosecutorial immunity. See, "Raising of Federal Question", Infra, at p.3. "Roneks are not aided by amending their complaint to include a Section 1983 action." Ronek vs. Gallatin County, 740 P.2d 11115, 44 St.Rptr. 1275, 1278 (1987).

It is hard to imagine an assertion that is more abjectly incorrect. Under Section 1983, immunities are solely a matter of federal law.

> Municipal defenses-including an assertion of sovereign immunity-to a federal right of action are, of course, controlled by federal law. (Citations omitted). 'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Section 1983 or Section 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be

> enforced.' Owen, at 445 U.S. 622, 647 note 30.

Yet this is exactly what the Montana Supreme Court did permit; a state immunity defense to have controlling effect, to nullify the basic guarantee of redress under Section 1983.

> They are different concepts and are supported by different considerations of public policy. Art. II, Sec. 18. . . did not abolish prosecutorial immunity. When a prosecutor acts within the scope of his duties by filing and maintaining criminal charges he is absolutely immune from civil liability, regardless of negligence or lack of probable cause. State ex rel. Department of Justice, supra, at 92, 560 P.2d at 1330. . . We extend the holding in State ex rel. Dept. of Justice, to include prosecutorial immunity for counties. Ronek vs. Gallatin County, 740 P.2d 1115, 44 St.Rptr. at 1277 (1987).

A reading of the opinion below by the Montana Supreme Court reveals a decision which taunts the recent applicable decisions of this Court on municipal liability. A municipality may not

claim a qualified immunity of its officers. Owen vs. City of Independence, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). In a later case, in dictum, this Court found no distinction between qualified and absolute immunities when considering municipal liability.

> When it comes to defenses to liability, an official in a personal capacity action may, depending upon his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. See, Imbler vs. Pachtman, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976) (absolute immunity); (other Citations omitted). In an official capacity action, these defenses are unavailable (Citations omitted). Kentucky vs. Graham, 473 U.S. 159, 87 L.Ed.2d 114, 122, 105 S.Ct. 3099 (1985) (emphasis supplied).

The issue in that case concerned an award of attorney's fees; this Court, however, took the opportunity to clarify the confusion existing in some courts (apparently, including the Montana

Supreme Court) between personal and official capacity suits.

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. (Citation omitted). Official capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent'. (Citations omitted). As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in All respects other than name, to be treated as a suit against the entity. (Citations omitted). It is not a suit against the official personally, for the real party in interest is the entity. Id, 87 L.Ed.2d at 121.

Montana law requires that actions be brought against the real party in interest. Rule 17(a), M.R.Civ.P.

In the instant case, this Court should clarify the ruling in Owen to hold that a municipality may not claim the absolute immunity of its officers for their constitutional torts.

It is appropriate to begin any analysis of municipal liability under Section 1983 with the plain language of the Civil Rights Act, which imposes liability upon "[e]very person who, under color of [state law], subjects or causes to be subjected, any citizen of the United States. . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws". 42 U.S.C. Section 1983. Monell vs. New York City Department of Social Services, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), held that these words included in the definition of person, a municipal corporation.

Congress intended the act to be broadly construed. Monell, supra, at 436 U.S. 683-687, Owen, supra, 445 U.S. at 636.

While the statute on it's face mentions no immunities, immunity is

granted under certain circumstances. Those circumstances are when

> ". . .a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" Id, at 637 quoting Pierson vs. Rae, 386 U.S. 547, 555 (1967).

Section 1983 immunity must have been established in the common law at the time the statute was enacted (1871) and its rationale must be compatible with the purposes of Section 1983. Id, at 638. Neither of these tests are satisfied by an award of immunity to Gallatin County.

> But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of Section 1983 that would justify the qualified immunity accorded the City of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under

Section 1983. Owen, 445 U.S. at 638.

The Montana Supreme Court hinted that for liability to attach, the County Attorney must act beyond his authority or be derelict in his duty. Ronek vs. Gallatin County, 740 P.2d 1115, 44 St.Rptr. 1275, 1278 (1987). This premise was rejected over one hundred and fifty years ago in a leading municipal law opinion quoted by the Owen court:

> Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful. Id, at 641 citing Thayer vs. Boston, 36 Mass. 511, 515, 516 (1837).

The Owen court also noted that nowhere in the congressional debates was it even suggested that the common law excused a city from liability on account of the good faith of its agents, much less any indication of congressional intent to incorporate such an immunity into the act.

As Owen noted, the liability of a municipality in Civil Rights cases is very nearly a form of strict liability.

> But a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative. . . [I]t looks only to whether the municipality has conformed to the requirements of federal constitution and statutes. 445 U.S. at 649.

There is absolutely no federal authority under 42 U.S.C. Section 1983, (other than the pre-Owen district court case of Armistead vs. Town of Harrison, 519 F.Supp. 777 (S.D.N.Y. 1984), quoted by the Montana Supreme Court) that insulates a municipality from the acts of its prosecutor.

The Montana Supreme Court recited the well known policy reasons for personal prosecutorial immunity as a rationale for its decision, quoting Imbler vs. Pachtman, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976) in 44 St.Rptr. at 1276. These reasons have

been soundly rejected by this Court when it has evaluated governmental, as opposed to personal, liability. In Owen, supra, this Court noted:

> Rather, in each case we concluded that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability. The concerns that justified those decisions, however, are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue. Owen, 445 U.S. at 653.

The Owen court noted that the two rationales for official personal immunity were:

> 1) [t]he injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; 2) [t]he danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good. Owen, 445 U.S. at 654.

The Owen court went on to obviate the "justice" prong of the above case by saying that it is "simply not implicated when the damages award comes not from the official's pocket, but from the public treasury", and further noted that it was hardly "unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby". Likewise, elemental notions of fairness dictate that Gallatin County, which caused Roneks to be needlessly deprived of their liberty and thrown in the jail, should bear that loss.

The second prong of the test i.e., the "chilling effect" of personal liability, is of course inapplicable "when it is the municipality, in contrast to the official, whose liability is at issue." Owen, 445 U.S. at 655. "The inhibiting effect is significantly

reduced, if not eliminated, however, when the threat of personal liability is removed." Id, at 656.

On the other hand, there are strong policy reasons, also noted by the Owen court, for imposing liability on a municipality for constitutional violations of elected or appointed officials who are personally immune.

> More important, though, is the realization that consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. Owen, 445 U.S. at 656.

The whole purpose of the enactment of Section 1983 was to provide a remedy for abuses of official power.

> 'To criticize Section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional

> rights is to criticize one of the statutes raisons d'etre.' Id, at 656.

This Court should conclude, as did the court in Owen, that municipalities have no immunity from damage liability flowing from the constitutional violations of an official who may (or may not) be absolutely immune. Such a decision

> ". . . harmonizes well with developments in the common law and our own pronouncements on official immunities under Section 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct. Owen, 445 U.S. at 657.

The decision in the court below puts the entire loss on the innocent individual. Montana prosecutors are free, under the decision below, to

commit constitutional torts at will with no possibility that an aggrieved individual may sue the local governmental unit in state court. The Montana Supreme Court's holding flaunts this Court's decisions under Section 1983, and should be summarily reversed by this Court.

A COUNTY IS LIABLE UNDER 42 U.S.C. SECTION 1983 FOR THE DISCRETIONARY ACTS OF A COUNTY ATTORNEY ACTING IN HIS OFFICIAL CAPACITY

The Montana Supreme Court stated in dictum that no specific policy or custom was alleged by the Petitioner as required in Monell vs. New York City Dept. of Social Services, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). The answer to this assertion is simple: None is required, if a tortfeasor is a person whose acts or edicts represent official policy. Pembaur vs. Cincinnati, 475 U.S. ___, 89 L.Ed.2d

452, 106 S.Ct. 1292, (1986), held that one act of a county prosecutor was sufficient to trigger Section 1983 liability.

In Pembaur, Hamilton County, Ohio was found liable for the acts of a county prosecutor, who ordered deputy sheriffs to forcibly enter Dr. Pembaur's office to serve warrants on two of Pembaur's employees, a violation of Pembaur's Fourth Amendment rights. The question presented in Pembaur was ". . . whether, and in what circumstances, a decision by municipal policymakers on a single occasion constituted official policy. . ." Pembaur, supra, 89 L.Ed.2d at 457. The court held that liability attaches where a choice to follow a course of action is made among various alternatives by an official responsible for making the final decision. In Montana, under most circumstances, the official responsible for making the

decision to initiate an arrest warrant is the county attorney.

> A determination by the county attorney to bring an action is discretionary, and is his duty under the law. There is no evidence or specific allegation the county attorney exceeded his authority or was derelict in his duty under the law. Ronek, 44 St.Rptr. at 1278.

Hamilton County Prosecutor Leis was not even named as a defendant in the Pembaur case. This was because the plaintiff's attorney thought that he was absolutely immune. Pembaur, 89 L.Ed.2d at 459, note 2. However, this Court imposed liability on Hamilton County for the one time act of a prosecutor who was not named as a defendant because he was a policy making official. The ruling of the Montana Supreme Court conflicts with the holding of Pembaur, directly on the "custom or policy" issue and implicitly on the municipal immunity issue.

A PROSECUTION FOR ALLOWING MECHANICS' LIENS TO ATTACH TO REAL PROPERTY

IS A VIOLATION OF THE FOURTH, THIRTEENTH AND FOURTEENTH AMENDMENT AND ACTIONABLE UNDER 42 U.S.C. SECTION 1983

The Amended Complaint alleges that Roneks were arrested without probable cause, which is of course a violation of the Fourth and Fourteenth Amendments, and deprived of due process of law (a violation of the Fourteenth Amendment) by the actions of Gallatin County, Montana.

Furthermore, the Thirteenth Amendment prohibits involuntary servitude and peonage unless a person is convicted of a crime. Thirteenth Amendment, U.S. Const. Roneks, of course, were only charged with the crime; and those charges were later dismissed. Therefore, they could not be jailed for this debt.

The Montana Supreme Court claims the Plaintiffs did not state the

infirmaty of the Complaint. The Complaint charges that County Attorney Don White and Deputy Jack Atkins were acting in their official capacity; alleges the charging document did not establish probable cause; alleges the charging document did not charge a crime; and alleges that the petitioners were prosecuted for debt.

It is not a crime to incur debt. There is not even a remote allegation of mental state of fraudulent conduct in the Complaint. The allegation is that the Roneks did not pay their suppliers. In plain language, they were broke. Roneks were deprived of due process because they were arrested and jailed for acts which do not constitute a crime.

> In order to state a claim under the fourteenth amendment, the complainant must allege facts showing not only that the state has deprived him of a liberty or property interest but also that the State has done so without due

process of law. Marrero vs. City of Hialeah, 625 F.2d 499, 519 (5th Cir. 1980).

Roneks were deprived of a liberty interest because they were put in jail. This happened without due process of law. Other damages not relevant to this discussion flowed from that deprivation of a liberty interest.

Marrero goes on to define due process: "[t]he rudimentary elements of due process are notice and the opportunity to be heard". (Citations omitted), Id, at 520. Allowing a mechanic's lien to attach to property is not a crime. There is no notice that it is a crime, because it is not. Petitioners were not even afforded the bare elements of due process. Their Complaint states a claim under 42 U.S.C. Section 1983 for which relief may be granted; dismissal under Rule 12(b)(6), M.R.Civ.P., was therefore improper.

Even if Montana had such a law of making criminal, a failure to perform work for which money had been obtained, or to pay for materials, it would be forbidden, both by the Thirteenth Amendment and the federal statutes enacted thereunder. In Pollock vs. Williams, 322 U.S. 4, 88 L.Ed 1095, 64 S.Ct. 92 (1944), this court invalidated a Florida statute (Id, at note 8) which made a failure to pay for a thing of value or to perform services a prima facia evidence of fraud. "Peonage is a status or condition of compulsory service. . . the basal fact is indebtness." Pollock, 322 U.S. 4 at 9, 88 L.Ed at 1099.

There is no place for a debtor's prison under the constitution. To prosecute under the color of a state criminal statute for a failure to perform a contractual obligation is a violation of the privileges and

immunities secured by the Fourth, Thirteenth and Fourteenth Amendments of the Constitution and actionable against Gallatin County under 42 U.S.C. Section 1983. This case should be summarily reversed and remanded to the Montana Supreme Court in light of this Court's holdings as set out above.

Respectfully submitted this 18 day of November, 1987.

LARRY JENT, ESQ.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petitioners' Brief has been served by depositing same in the United States mail with the proper postage, on this 14th day of December, 1987 to the following, to wit:

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APPENDIX A

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VOLUME 44

No. 86-575

WAYNE RONEK and ROGER RONEK,

Plaintiffs and Appellants,

vs.

GALLATIN COUNTY, MONTANA,

Defendant and Respondent.

Submitted: June 2, 1987
Decided: July 29, 1987

COUNTIES--OFFICERS AND PUBLIC EMPLOYEES, Appeal from order dismissing complaint for failure to state a claim on which relief can be granted. The Supreme Court held: (1) A determination by a county attorney to bring an action is discretionary, and is his duty under the law, and (2) There is no evidence or specific allegation the county attorney exceeded his authority or was derelict in his duty under the law.

Appeal from the Eighteenth Judicial District Court, Gallatin County, Honorable Mark P. Sullivan, Judge

For Appellant: Larry Jent, Bozeman

For Respondent: Harrison, Loendorf & Poston, Helena
A. Michael Salvagni, County Attorney, Bozeman

For Amicus Curiae: Mark Murphy, Asst. Atty. General, Montana County Attorneys Assoc., Helena

Mr. Jent argued the case orally for Appellant; and Mr. Stephen R. McCue for Respondent.

Opinion by Justice Harrison; Chief Justice Turnage and Justices Weber, Sheehy, Gulbrandson, Hunt and McDonough concur.

Affirmed.

[44 St.Rptr. 1276]

Mr. Justice Harrison delivered the Opinion of the Court.

Appellants appeal an order of the District court of the Eighteenth

Judicial District in and for Gallatin County, Montana, dismissing their complaint for failure to state a claim on which relief can be granted. We affirm.

This case arose out of a criminal prosecution in which the complaint, filed in Gallatin County justice court, charged common scheme theft in violation of sec. 45-6-301(a), MCA. Roneks, appellants here, purportedly contracted to build garages for certain named owners of property in Gallatin County and then failed to pay the materialmen who provided materials used in the construction. The County dismissed the complaint almost two months after the charges were brought. Roneks then filed a complaint against the County, premised on the theory of malicious prosecution, specifically that the charge was brought without probably cause, and for false

imprisonment. The County filed its answer denying all material allegations.

Gallatin County then filed an application for a writ if supervisory control with this Court, directed to the District Court and ordering the Roneks' complaint be dismissed. The application was denied. Meanwhile, Roneks successfully moved to amend their complaint to reflect a cause of action for violation of their constitutional rights under 42 U.S.C. sec. 1983, part of the Civil Rights Act of 1871. In this count Roneks alleged that Gallatin County was liable for the action of the Gallatin County Attorney "while carrying out the policy of [Gallatin County]." The action as directed at the County only and not against any individuals. Gallatin County moved to dismiss that count, the parties submitted briefs, including an amicus brief from the Montana County Attorneys Association.

At oral argument the court granted Gallatin County leave to renew its motion to dismiss the entire complaint, including the first count alleging malicious prosecution, which the court previously had denied. Roneks were permitted to amend their complaint a second time. The District Court dismissed the entire second amended complaint in August 1986, concluding the County was not the proper entity for either of the two counts. Roneks appeal.

The dispositive issue in this case is whether Gallatin County is the proper defendant, whether the charge is malicious prosecution or violation of sec. 1983 of the Civil Rights Act. Appellants apparently concede the immunity of the county attorney.

The common law powers and duties of the prosecutor can be traced back to the English common law and have been part of

our system of jurisprudence since the days of the Bannack statutes. State ex rel. Ford v. Young (1918) 54 Mont. 401, 403, 170 P. 947, 948. The prosecutor is a quasi-judicial officer who enjoys common law immunity from civil liability for conduct within the scope of his duties. This allows him "to speak and act freely and fearlessly in enforcing the criminal laws." State ex rel. Dept. of Justice vs. District Court (1977), 172 Mont. 88, 90, 560 P.2d 1328, 1329.

[44 St.Rptr. 1277]

"The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his

decisions instead of exercising the independence of judgment required by his public trust."

Imbler v. Pachtman (1976), 424 U.S. 409, 422-423, 96 S.Ct. 984, 991, 47 L.Ed.2d 128, 139.

We have made clear the abolition of sovereign immunity in Art. II, sec. 18 of the 1972 Montana Constitution does not abolish prosecutorial immunity.

"They are different concepts and are supported by different considerations of public policy. Art. II, sec. 18 . . . did not abolish prosecutorial immunity. When a prosecutor acts within the scope of his duties by filing and maintaining criminal charges he is absolutely immune from civil liability, regardless of negligence or lack of probable cause."

State ex rel. Dept. of Justice, supra, at 92, 560 P.2d at 1330. The doctrine must encompass the state and its

agencies, as well as the prosecutor, or its efficacy will be lost. Id. The Court finds it unnecessary to confront the thorny problem of whether the county attorney in his prosecutorial capacity is an agent of either the county or the state in order to reach a decision in this case.

We extend the holding in State ex rel. Dept. of Justice to include prosecutorial immunity for counties. Nonetheless, we will address certain of Roneks' arguments in an effort to clarify the holding. They argue the District Court ignored the distinction between personal capacity suits and official capacity suits. Their contention is Gallatin County, the only named defendant in this action, cannot use the personal prosecutorial immunity of the county attorney as a shield for its own liability in an official

capacity action. We do not find that is what the County is doing, however.

Personal capacity suits seek to impose personal liability on a governmental official for actions he takes under color of state law. Scheuer v. Rhodes (1974), 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90, 98. Clearly the case at bar is not such a case. By contrast, however, Roneks argue that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. N.Y. City Dept. of Social Services (1978), 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611, 635, n. 55. The Court in Monell continued, however:

"[L]ocal government officials sued in their official capacity are "persons" under sec. 1983 in those cases in which,

as here, a local government would be suable in its own name." Id.

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In Monell, the New York City Department of Social Services and the City Board of Education, as a matter of official policy, compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The named defendants, the Department and its Commissioner, the Board and its Chancellor, the City of New York and its Mayor, were sued solely in their official capacities.

In the case at bar, the county attorney is not a named defendant in either his personal or official capacity. Further, Gallatin County is immune from suit when prosecutorial misconduct is at issue by virtue of our holding in State ex. rel. Dept. of Justice, supra. In order to apply the reasoning in

Monell, an official of the governmental entity must be suable in its own name. Neither circumstance pertains here.

The prosecutorial duties of the county attorney are defined statutorily and include drawing all indictments and informations. Section 7-4-2712, MCA. the county attorney also must:

"(1) attend the district court and conduct, on behalf of the state, all prosecutions for public offense and represent the state in all matters and proceedings to which it is a party or in which it may be beneficially interested, at all times and in all places within the limits of his county;

"(2) when ordered or directed by the attorney general to do so, promptly institute and diligently prosecute in the proper court and in the name of the state of Montana any criminal or civil action or special proceeding;

"(3) defend all suits brought against the state."

Section 7-4-2716, MCA. A determination by the county attorney to bring an action is discretionary, and is his duty under the law. There is no evidence or specific allegation the county attorney exceeded his authority or was derelict in his duty under the law.

Roneks are not aided by amending their complaint to include a sec. 1983 action.

42 U.S.C. sec. 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

Local government entities can be sued under sec. 1983.

[44 St.Rptr. 1279]

"[w]here . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. However, . . . [there must be] an allegation that official policy is responsible for a deprivation of rights protected by the Constitution."

Monell v. N.Y. City Dept. of Social Services, supra, at 690, 98 S.Ct. at 2035-2036, 56 L.Ed.2d at 635.

"[P]laintiffs have failed to allege with specificity that any particular action was taken pursuant to any

particular policy, [or] that any specified policy exists. . ." Whelehan v. County of Monroe (W.D.N.Y. 1983) 558 F.Supp. 1093, 1103.

A careful examination of the pleadings does not enlighten the Court as to which of Roneks' constitutional rights were violated. A suspect who is jailed pursuant to a valid warrant has no claim under the Fourteenth Amendment to the United States Constitution that he was deprived of his liberty without due process. Baker v. McCollan (1979), 443 U.S. 137, 143-146, 99 S.Ct. 2689, 2694-2695, 61 L.Ed.2d 433, 441-442. (In the case at bar, Roneks allege the arrest warrant was not valid, but fail to allege the nature of the infirmity.) Nor does the allegation of malicious prosecution automatically include the elements of a sec. 1983 action. Bretz v. Kelman (9th Cir. 1985), 773 F.2d 1026.

Nor can a local government be held liable solely because it employs a tortfeasor. That is, a local government cannot be held liable under sec. 1983 on a respondeat superior theory. Only when an injury results from execution of a government policy or custom is the governmental entity responsible under sec. 1983. See Monell, supra, at 691-694, 98 S.Ct. at 2035-2037, 56 L.Ed.2d at 635-637.

There are strong policy reasons for absolute prosecutorial immunity for governmental entities, as well as for personal immunity of the prosecutor.

"It can scarcely be denied that a defendant who has been acquitted of criminal charges has nothing to lose by commencing a sec. 1983 action against the prosecutor's municipal employer. The costs to the public from frivolous claims of malicious prosecution, however, are great, and far outweigh the

minimal deterrent effect of civil suits on actual prosecutorial misconduct. Whether the government's case is weak or strong, if there is evidence establishing probable cause to believe criminal acts have been performed, the prosecutor should be given every incentive to submit the evidence to the "crucible of the judicial process so that the factfinder may consider it . . . to determine where the truth lies." Imbler v. Pachtman, 424 U.S. 409, at 440, 96 S.Ct. 984, 999, 47 L.Ed.2d 128 (1976) White J., concurring in the judgment. These incentives are not provided if the prosecutor is to be constantly distracted by civil actions under sec. 1983 that require a judge and jury to second guess the propriety

[44 St.Rptr. 1280]

of his acts performed in discharging his core responsibilities."

Armstead v. Town of Harrison (S.D.N.Y.) 1984), 579 F.Supp. 777, 782-783. See also State ex rel. Dept. of Justice, supra, and cases cited therein.

This lawsuit illustrates the importance of prosecutorial immunity.

"Prosecutorial immunity does not reflect judicial or social approval of prosecutorial misconduct, but rather reflects a balance between an individual's right to be treated fairly by prosecutors and society's need to keep the criminal justice system functioning without undue interference and protracted delay."

Siano v. Justices of Massachusetts, (1st Cir. 1983), 698 F.2d 52, 57. Cert. denied (1983), 464 U.S. 819, 104 S.Ct. 80, 78 L.Ed.2d 91.

The order dismissing the complaint is affirmed.

IN THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF GALLATIN

WAYNE RONEK and ROGER RONEK,

Plaintiffs, NO. DV 84-908
DV 84-909

vs.

GALLATIN COUNTY, MONTANA,

Defendant.

MEMORANDUM OPINION
AND
ORDER

This matter came on for hearing on May 23, 1986, on defendant's motion to dismiss plaintiffs' first amended complaint. M.R.Civ.P. 12(b). Plaintiffs were represented by Larry Jent, and defendant was represented by Stephen R. McCue, of the firm of Harrison, Loendorf & Poston, P.C., and Mike Salvagni, Gallatin County Attorney. The Montana County Attorney's Association as amicus curiae was represented by Mark

Murphy of the Montana Attorney General's Office.

Prior to oral arguments, briefs were filed by both parties and amicus curiae on defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

At the hearing, the court on its own motion ruled that it would reconsider its earlier ruling of June 24, 1985, in which it denied defendant's motion to dismiss the First Count of plaintiffs' complaint alleging malicious prosecution, upon receipt of a written motion to that effect by defendant. The Court also ruled that it would allow plaintiffs until June 6, 1986, in which to again amend their complaint. Subsequent to the hearing, the plaintiffs filed a second amended complaint and defendant filed a motion to dismiss both counts of this complaint.

The Court has fully considered the oral argument and briefs filed in this matter, and deems the matter submitted for decision.

Malicious Prosecution

This action names only Gallatin County as a party defendant, but the allegations of the second amended complaint involve a decision to prosecute plaintiffs taken by the Gallatin County Attorney, Don White, and his Deputy County Attorney, Jack Atkins. The second amended complaint does not allege that Gallatin County, through its county commissioners, had any involvement in the events alleged. Under the statutory scheme, the Montana Attorney General has supervisory powers over county attorneys in all matters pertaining to their official duties, including criminal prosecutions. Section 2-15-501(5) MCA. The charges in this case were brought by the Gallatin County

Attorney in the name of the State of Montana, under the supervision of the attorney general. The county was not a party of the criminal action of which Roneks complain.

A county attorney is also paid for his role as a criminal prosecutor by the State. A county attorney is paid half of his salary by the State of Montana. Section 7-4-2502(2)(a), MCA. In the criminal phase of his work, a county attorney is supervised by the state, acting through the attorney general and the Department of Justice.

Since Gallatin County itself had no involvement in the alleged malicious prosecution, it may not be held liable in this action. The proper defendant, if any, would be the State of Montana, acting through the attorney general. It is apparent from review of Montana's governmental structure that county governments have no control over the

actions of an elected county attorney. The county commissioners cannot order a county attorney to file criminal charges, or not to file them. They lack statutory authority to do so; further, this authority is expressly vested in the attorney general. Other jurisdictions have held that a county cannot be held liable for acts of certain elected county officials. In Allen v. Fidelity & Deposit Company of Maryland, 515 F.Supp. 1185 (D.S.C. 1981), the court held in a section 1983 action that the county could not be held liable for acts of the sheriff based upon the fact that " historically in South Carolina the deputy sheriffs are answerable only to the sheriff and not to the county government." Id. at 1190. The Allen court reasoned that the lack of supervisory function or control by the county over the sheriff or deputies relieves

the county of any responsibility for them.

As in Allen, the Gallatin County Commissioners or other top officials of Gallatin County have no authority to direct the county attorney in the discharge of his duties. Accordingly, the county government is not liable for the decision by Don White and Jack Atkins to prosecute Roneks. The only governmental entity responsible for this action is the State of Montana acting through the Montana Attorney General. However, a review of the exhaustive briefs and argument on this issue convinces the Court that the state is immune from suit under the doctrine of absolute prosecutorial immunity.

It is well settled in this jurisdiction that both the attorney general of the State of Montana, as well as the state and its agencies, are absolutely immune from civil liability, regardless

of negligence or lack of probable cause, when acting within the scope of their duties by filing and maintaining criminal charges. State ex rel. Dept. of Justice v. District Court, 172 Mont. 88, 560 P.2d 1328 (1976). The State ex rel. Dept. of Justice court decided an action brought under the theory of malicious prosecution, which is the theory advanced by plaintiffs in the First Count of their second amended complaint. However, the Montana court in that case adopted and cited the reasoning of Imbler v. Pachtman, 424 U.S.409 (1976), in support of its decision although Imbler dealt with alleged section 1983 civil rights violations, rather than malicious prosecution. The State ex rel. Dept. of Justice case extends the Imbler rationale for absolute prosecutorial immunity not only to prosecutors personally, but also to the state governmental entity.

It is thus apparent that both the Montana Attorney General individually and the State of Montana, acting through its Department of Justice, may claim absolute immunity from damages sought by Roneks in this action. The court sees no other possible defendants which Roneks may have a cause of action against for the alleged theft prosecution. Count one of their second amended complaint must therefore be dismissed for want of a liable defendant.

Section 1983 (Civil Rights).

The Second Count of plaintiffs' second amended complaint alleges that Gallatin County, acting through its county attorney, violated plaintiffs' civil rights, and seeks a remedy under 42 USC Section 1983, the federal civil rights statute. However, the same analysis as applied to the malicious prosecution theory set forth above,

leads the court to conclude that Gallatin County is not the proper defendant to plaintiffs' allegations. The County government has no control over alleged civil rights violations in criminal prosecutions; supervision of these matters is left by statute to the attorney general. The lack of any express statutory authority over the county prosecutor vested in county commissioners or other county officials buttresses this conclusion.

Roneks allege numerous facts which they contend amount to violations of their federal constitutional and statutory rights. The crux of Roneks' second amended complaint is that they were arrested without probably cause to believe that they committed the crime of theft. However, Roneks have no guarantee that they will only be arrested if they are guilty of crime. If every innocent or acquitted defendant could

attack the decision to issue an arrest warrant by a magistrate, and the decision to prosecute made by a prosecutor, the wheels of justice would long ago have ground to a halt. The Constitution does not afford such unlimited protections and remedies to criminal defendants. Baker v. McCollan, 443 U.S. 137, 145-46 (1979). The discretion exercised by judges and prosecutors in the matter of whom to arrest and prosecute is beyond the scope of a civil rights action. Hall v. Flathead County Attorney, 478 F.Supp. 644 (D.Mont. 1979).

However, because the court has concluded that, just as under the malicious prosecution theory, the Montana Attorney General and the State of Montana may claim absolute prosecutorial immunity from a Section 1983 action for advocating the state's

case in court, it is unnecessary to dwell at length upon the nature of any possible civil rights violations which allegedly occurred. It is sufficient to note that, whatever the wisdom of the Gallatin County Attorney's decision to prosecute Roneks, none of their civil rights were violated.

Even if a governmental entity could be held liable for a county attorney's decision to prosecute Roneks, the second amended complaint fails to allege a governmental policy or custom depriving Roneks of their civil rights with the requisite specificity to maintain a SEction 1983 action against a government. To bring an action under Section 1983 against a municipal or state government, a plaintiff's allegations must identify a policy, connect the policy to the local government, and show that the particular injury was incurred

because of the execution of that policy. The lack of specificity in these essentials is fatal to a Section 1983 action. See, e.g., Gaborik v. Rosema, 599, F.Supp. 1476, 1479 n.1 (W.D.Mich. 1984). Roneks have not specified any particular Gallatin County policy or directive which resulted in their arrest on theft charges. Accordingly, their second amended complaint is deficient in its attempt to state a cause of action under Section 1983 against the county.

As in a malicious prosecution case against prosecuting attorneys, the State of Montana and its attorney general are absolutely immune from damage liability under Section 1983 as well. The policy of encouraging vigorous law enforcement by prosecutors, and the goal of protecting a criminal defendant's right to scrupulously fair post-conviction review of his case by the courts requires

absolute immunity of prosecutors under any theory of recovery. See Imbler v. Pachtman, 424 U.S. at 427-28. Don White and Jack Atkins were acting completely within their prosecutorial function by bringing the criminal charges Roneks complain of. Thus, the Montana Attorney General and the State of Montana may claim absolute immunity for the Gallatin County Attorney's decision to bring criminal charges against plaintiffs.

Malicious prosecution and civil rights actions brought against criminal prosecutors are equally as vexing and harassing if they are brought against local and state governments, rather than prosecutors individually. No matter who the defendant is in such cases, they rob prosecutors and local governments of valuable resources which could be better spent in the criminal justice system, and deter public-spirited persons from

seeking responsible positions in government. It is therefore entirely consistent with the rationale for absolute prosecutorial immunity to hold that governmental entities may claim the absolute prosecutorial immunity of their prosecutors in a Section 1983 action for damages, such as this case. See Armstead v. Town of Harrison, 79 F.Supp. 777, 782-83 (S.D.N.Y. 1984).

The Court therefore concludes that the Second Count of Roneks' second amended complaint must also be dismissed for failure to state a legally cognizable claim against Gallatin County.

ORDER

Pursuant to the foregoing opinion, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Preliminary Pre-trial Order and Order Setting Trial Date dated February 18, 1986 is hereby vacated.

2. That both Counts of this action be and they are hereby dismissed with prejudice.

DATED this 11th day of August, 1986.

/S/
MARK P. SULLIVAN
DISTRICT COURT JUDGE

IN THE SUPREME COURT

OF THE STATE OF MONTANA

No. 86-575

WAYNE RONEK and ROGER RONEK,

Plaintiffs and Appellants,

vs.) ORDER

GALLATIN COUNTY, MONTANA,

Defendant and Respondent.

The petition for rehearing is denied.

DATED this 26th day of August, 1987.

/S/

Chief Justice

(2)

No. 87-1248

In The

Supreme Court of the United States

October Term, 1987

WAYNE RONEK and ROGER RONEK,

Petitioners,

vs.

GALLATIN COUNTY, MONTANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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26 pp

QUESTIONS PRESENTED

1. Does the allegation that the county merely filed criminal charges against Roneks without probable cause state a cause of action for violation of their rights under 42 U.S.C. § 1983?

2. May Gallatin County assert the absolute personal immunity of its county prosecutors from malicious prosecution and § 1983 liability as a bar to its own liability?

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STATEMENT OF THE CASE

Petitioners, Wayne Ronek and Roger Ronek, brought an action in the Montana District Court for Gallatin County. Their original complaint, and the twice-amended later versions, seek damages from Gallatin County for the common law tort of malicious prosecution, and for violation of their federal rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The District Court for Gallatin County dismissed the complaint with prejudice under Rule 12(b)(6), M.R.Civ.P. On appeal, the Montana Supreme Court affirmed the dismissal. Roneks now seek review by this Court by their Petition for Writ of Certiorari.

The first count of Roneks' second amended complaint alleges that Gallatin County Attorney Don White and Deputy Gallatin County Attorney John P. Atkins, acting in their official capacity, prosecuted the Roneks in a criminal action, charging them with a violation of section 45-6-301(2)(a), MCA, the theft statute. The second amended complaint characterizes the theft charges as brought by the county attorney against Roneks for "contracting to build garages for certain named owners of property in Gallatin County, Montana and then failing to pay the materialmen who provided materials used in said construction."

Throughout their petition filed in this Court, Roneks characterize the county's theft prosecution as a "debt collection action;" i.e., they charge that Gallatin County misapplied its power to charge a criminal violation in what was nothing more than a civil matter. This characterization is incorrect. The criminal complaint charged Roneks with "purposely or knowingly obtain[ing] by deception

control over property of several owners with the purpose of depriving those owners of that property. . . ." Petition for Writ of Certiorari, at ix. The complaint thus charged the criminal intent which is requisite to a criminal action. The county's charges against Roneks therefore were not merely of a civil nature, but rather alleged the commission of the crime of theft via a scheme to defraud their suppliers.

The first count of Roneks' complaint is premised on a theory that Gallatin County committed the tort of malicious prosecution. In substance, Roneks allege that the Gallatin County Attorney brought criminal charges against them without probable cause. However, the allegation of a lack of probable cause for the criminal prosecution rests merely on the assertion that "there was no evidence of any criminal intent for this crime or any other crime of theft, and there was no evidence that any act amounting to any crime of theft had been committed." Second Amended Complaint, First Count, paragraph VI.

Roneks assert that "there was no independent judicial determination of probable cause" made prior to their arrest on the criminal charge. Petition for Writ of Certiorari, at x. This is also incorrect. Copies of the criminal Complaint and Warrant of Arrest filed by Petitioners in this case reveal that Gallatin County Justice of the Peace Norma A. Schmall ordered Roneks' arrest based upon the sworn complaint of deputy county attorney John P. Atkins. This procedure amounted to a determination by a neutral and detached magistrate that, based upon Atkins' sworn testimony, probable cause existed to arrest Petitioners.

Roneks claim they are innocent of the theft charges, and point to their subsequent acquittal based on a voluntary dismissal almost two months after the charges were originally brought.

The second count of Roneks' second amended complaint incorporates all allegations of the first count, and alleges that these factual allegations state a cause of action for violation of Roneks' federal constitutional rights. They allege that Gallatin County is liable for the alleged actions of the county attorney, and that these actions were taken "while carrying out the policy of [Gallatin County]." Second Amended Complaint, Second Count, paragraph VI. The complaint seeks a remedy in money damages for these alleged violations under 42 U.S.C. § 1983.

Finally, it is crucial to note that Roneks are not suing Don White, John P. Atkins, or any other county officials involved in the alleged prosecution. Rather, they are seeking to maintain an action exclusively against the governmental entity which allegedly employed the officials who commenced the prosecution, Gallatin County, Montana.

ARGUMENT

I. RONEKS' ALLEGATION THAT THE COUNTY MERELY FILED CRIMINAL CHARGES AGAINST THEM WITHOUT PROBABLE CAUSE FAILS TO STATE A CAUSE OF ACTION FOR VIOLATION OF THEIR RIGHTS UNDER § 1983.

A. GALLATIN COUNTY'S ALLEGED PROSECUTION OF RONEKS WITHOUT PROBABLE CAUSE WAS AT MOST MERE NEGLIGENCE, WHICH DOES NOT AMOUNT TO A DEPRIVATION OF LIBERTY UNDER THE DUE PROCESS CLAUSE.

A suspect who, despite his protest of mistaken identity, was arrested and detained in jail for three days pursuant to a valid warrant, has no claim under the fourteenth amendment of the U.S. Constitution that he was deprived of his liberty without due process of law. He therefore had no cause of action under § 1983 for violation of a constitutional right. *Baker v. McCollan*, 443 U.S. 137 (1979).

The facts of *Baker* are strikingly similar to those alleged by Roneks. In *Baker*, the plaintiff was arrested based on a case of mistaken identity. The plaintiff's brother had previously carried false identification under which he masqueraded as the plaintiff, and had been arrested on narcotics charges. He was booked under the name of the plaintiff, however, and when he did not appear for subsequent proceedings, an arrest warrant was issued in his innocent brother's name. The innocent brother/plaintiff was arrested on that warrant over his protest, taken into custody by the county sheriff, and de-

tained in jail for three days before the error was discovered and the plaintiff was released. The plaintiff brought a § 1983 action against the sheriff, seeking damages for violation of his civil rights. The plaintiff maintained that, because he was innocent, and law enforcement officials had negligently arrested and incarcerated him, they had violated his right to be free from deprivation of liberty without due process of law.

This Court, addressing his claim, first noted that a tort law theory of recovery, such as false imprisonment, may not be advanced under § 1983. By its terms § 1983 provides a remedy for violations only of *constitutional* rights, not rights secured by state tort law. *Id.* at 142. For purposes of its decision, the *Baker* Court recognized that the plaintiff had not challenged the validity of the arrest warrant, and therefore the Court assumed that it comported with the requirement of the fourth amendment that warrants may issue only upon probable cause. *Id.* at 143. The Court held that, since the plaintiff had been arrested pursuant to a valid warrant, and detained for a relatively brief period before his innocence was discovered and he was released, he had no cognizable claim under § 1983 for deprivation of his right to due process of law. The arrest warrant itself, said the Court, had been issued pursuant to procedures in conformance with the fourth amendment. *Id.* at 143-44.

This Court then concluded:

> [Plaintiff's] innocence of the charge contained in the warrant . . . is largely irrelevant to his claim of deprivation of liberty without due process of law. [Footnote omitted]. The Constitution does not guar-

> antee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights "without limits." [Citation].
>
> . . . .
>
> . . . Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity *or a defense such as lack of requisite intent.* Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error free investigation of such a claim. *The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.*

Id. at 145-46 (emphasis added).

Although Roneks allege that the warrant for their arrest was invalid, they fail to allege the nature of the infirmity. Roneks have not alleged there were any constitutional defects in the procedures that the Gallatin County Attorney and the judicial system employed in their prosecution. They claim only that they were innocent of any crime of theft, that they lacked the requisite criminal intent to commit the crime charged, and that there therefore was no probable cause to charge and arrest them. *Baker* holds that such protestations of innocence, premised on mere mistake or negligence by officials filing criminal charges and detaining suspects for a relatively brief

period pursuant to a valid arrest warrant, fail to state a cause of action under § 1983.

A determination of probable cause was made here by Justice of the Peace Schmall, a neutral and detached magistrate who, the record shows, considered prosecutor Atkins' affidavit testimony in the form of his sworn complaint before issuing an arrest warrant for Roneks on the theft charges. This procedure, even if mistakenly employed against innocent suspects, fully protects Roneks' constitutional rights to due process of law, protection of their liberty interest, and freedom from search and seizure without probable cause. *See Gerstein v. Pugh,* 420 U.S. 103, 125 (1975).

Baker's reasoning that negligence, without more, does not support a claim of deprivation of liberty under the due process clause, has recently been made the explicit holding of this Court in *Daniels v. Williams,* 474 U.S. 327 (1986). The Court in *Daniels* held that, whether a procedural or substantive due process violation is alleged, involving deprivations of liberty or property, something more egregious than mere negligence is required to state a due process violation actionable under § 1983. The Court reasoned that the due process clause requires for its violation some abuse of governmental power, and negligent conduct does not constitute such an abuse of power. Gallatin County's negligence or mistake in charging and arresting Roneks for theft therefore cannot rise to the level of a deprivation of liberty under the due process clause.

The Montana Supreme Court's reliance upon *Baker v. McCollan* in analyzing Roneks' claimed due process

violation is sound, and does not merit review by this Court. The decision below is in harmony with decisions of this Court construing the due process clause of the fourteenth amendment.

B. EVEN IF RONEK'S COMPLAINT ALLEGES A DEPRIVATION OF LIBERTY, NEITHER THEIR PROCEDURAL NOR SUBSTANTIVE DUE PROCESS RIGHTS HAVE BEEN VIOLATED.

Because Justice of the Peace Schmall issued an arrest warrant for Roneks based upon the sworn complaint of prosecutor Atkins, Roneks were accorded all of the procedural safeguards required by the fourth and fourteenth amendments. There are no allegations that the procedures employed were in any way irregular. Roneks' complaint reduces to quibbling with the *language* of the criminal complaint, which they contend does not support Judge Schmall's determination that probable cause existed to arrest them for theft. Petitioners contend that this language only makes out a case for civil debt collection, not criminal theft. Reading the factual allegations in the second quoted paragraph of the criminal complaint in isolation from the allegations of the first quoted paragraph, Roneks contend that "[f]ailing to pay the materialmen . . . for the materials furnished" supports only a civil debt collection action, not a criminal prosecution. Petition for Writ of Certiorari, at ix-x. However, Roneks' strained reading of this language ignores the first paragraph of the complaint, in which they were charged with "purposely or knowingly obtain[ing] by deception control over property," i.e., the requisite criminal intent for the crime of theft.

Roneks' myopic reading of the criminal complaint is unconvincing, and surely is not supportive of their contention that Judge Schmall had insufficient affidavit testimony before her to support her finding of probable cause. The Montana Supreme Court properly rejected their argument. Indeed, that court recently held that a criminal complaint reasonably apprises the accused of the charges against him, so that he may prepare his defense, if the charges sufficiently express the language of the statute which defines the offense. *State v. Matson,* — Mont. —, 736 P.2d 971, 975 (1987). The Montana court concluded, by rejecting Roneks' argument on this point, that the language of the criminal complaint sufficiently paraphrased section 45-6-301(2)(a), MCA, the theft statute, such that they were informed of the charges and could prepare their defense.

The second amended complaint does not allege any procedural due process violation. The record below contains no showing that Roneks "were unconstitutionally deprived of liberty or by the distortion and corruption of the processes of law." *Johnson v. Barker,* 799 F.2d 1396, 1400 (9th Cir. 1986).

Even if the three days Roneks spent in jail upon their arrest, pending posting of bail, constitutes a deprivation of a liberty interest, this relatively brief incarceration does not amount to use of Gallatin County's governmental power in a way which "shocks the conscience." The allegations of the complaint fail to meet this test for substantive due process claims long adhered to by this Court. *See Rochin v. California,* 342 U.S. 165 (1952).

Roneks claim that Gallatin County should never have instituted the theft prosecution in the first place, even if the proceeding had all the necessary procedural attributes of a fair hearing. Thus, Roneks are claiming that their substantive due process right has been violated. However, their complaint makes no showing that the circumstances of their arrest and three-day detention amounted to "conscience shocking" conduct by the county. Although the standards that have been set out to identify substantive due process violations are "somewhat hazy," *Johnson v. Barker,* 799 F.2d at 1400, examples of cases raising this issue help place the case at bar in context for substantive due process evaluation.

Johnson v. Barker, supra, involved criminal charges brought by a county attorney against persons who allegedly trespassed in a restricted area near Mount St. Helens shortly after it erupted in 1980. For purposes of its decision, the *Johnson* court presumed that these criminal charges were baseless, but that the sheriff wanted to prosecute the individuals for political reasons. The court held that "[m]ost clearly, this scenario does not give rise to a valid denial of substantive due process claim." *Johnson,* 799 F.2d at 1400. The conduct by the county and its officials was neither brutal nor "was it so egregious as to 'shock the conscience.'" *Id.* Thus, the mere filing of baseless criminal charges, without probable cause, does not offend the norms of substantive due process.

Even an arrest pursuant to criminal charges, which might otherwise support a state law claim for malicious prosecution, does not necessarily rise to the level of a substantive due process violation actionable under § 1983.

Fiser v. Bowling, 812 F.2d 1406 (6th Cir. 1987) (dismissing plaintiff's § 1983 claim following arrest for driving while intoxicated) (cited in *McMaster v. Cabinet for Human Resources,* 824 F.2d 518, 522 (6th Cir. 1987)). Roneks therefore must demonstrate something more than a mere arrest incident to a procedurally valid criminal prosecution occurred to create a substantive due process issue for consideration by this Court.

Finally, in this connection, it is interesting to note that the plaintiff in *Baker v. McCollan,* supra, alleged a deprivation of liberty under the due process clause where he was confined to jail for three days. This Court concluded that, while the plaintiff could not be detained indefinitely without running afoul of other constitutional requirements, "we are quite certain that a detention of three days over a New Year's weekend does not and could not amount to such a deprivation." *Baker,* 443 U.S. at 145. The three-day detention in *Baker* obviously did not shock the conscience of this Court, nor should the three-day detention of Roneks by Gallatin County shock the Court's conscience.

C. THE ALLEGED DEPRIVATION OF LIBERTY DOES NOT VIOLATE THE THIRTEENTH AMENDMENT PROSCRIPTION AGAINST INVOLUNTARY SERVITUDE.

Roneks argue that their criminal prosecution was in fact an attempt to imprison them for their financial insolvency, or mere failure to pay their debts to their suppliers. From this dubious proposition, they have extrapolated a claim that their thirteenth amendment right to be free from involuntary servitude was violated. In support of

this argument, they cite *Pollock v. Williams,* 322 U.S. 4 (1944).

The case does not support Roneks' claim. *Pollock* involved a statute that made refusal of a debtor to perform *labor* for his creditor under a contract for such services prima facie evidence of intent to defraud. The Court held that the statute was unconstitutional under the thirteenth amendment; "no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor." *Pollock,* 322 U.S. at 18.

Roneks were not prosecuted for failure to complete labor under a contract of indentured servitude. Rather, they were charged with fraudulently incurring debts with the intent not to pay them. The subject of their contracts with suppliers was building materials, not labor. This specious argument should be summarily rejected by this Court.

II. GALLATIN COUNTY IS ABSOLUTELY IMMUNE FROM DAMAGE LIABILITY UNDER § 1983 FOR PROSECUTING RONEKS.

This is a case of first impression in this Court on the issue whether a governmental entity can claim absolute immunity from § 1983 liability for prosecutorial conduct for which its prosecutor is *personally* absolutely immune. However, lower federal courts have uniformly determined that local governments can claim absolute prosecutorial immunity under § 1983. Since there is no split in the federal circuits on this issue, and the Montana Supreme Court's decision below properly adhered to federal court decisions, this Court need not decide the issue here.

This Court has held that a state prosecuting attorney who acts within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case is absolutely immune from personal liability in a civil suit for damages under § 1983 for alleged deprivations of the accused's constitutional rights. *Imbler v. Pachtman,* 424 U.S. 409 (1976). The immunity attaches even if the prosecutor is allegedly intentionally dishonest or negligent in bringing a criminal prosecution. *Id.* at 416.

The primary reasons given by the Court for according immunity to the prosecutor in a § 1983 action are first, to encourage the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Second, absolute prosecutorial immunity promotes judicial decisions in post-conviction proceedings, when convicted criminals challenge the fairness of their trial and conviction, based solely upon insuring justice, rather than "defensively" to avoid subjecting the prosecutor to civil liability. *Id.* at 427-28.

The *Imbler* Court noted the obvious dangers of allowing prosecutors to be subject to civil liability to persons charged with criminal wrongdoing. Since such suits likely would be brought frequently by disgruntled criminal suspects, the prosecutor's energy and attentions "would be diverted from the pressing duty of enforcing the criminal law." *Id.* at 425. Moreover, prosecutors must frequently decide to initiate a prosecution with a lack of time and information. Requiring the prosecutor to continually defend these many decisions, often long after the fact, would create an intolerable burden upon the prosecutor re-

sponsible for hundreds of indictments and trials annually. *Id.* at 425-26.

Respondent Gallatin County was engaged in just such an exercise of prosecutorial discretion when county attorney Don White and his deputy, John P. Atkins, brought criminal theft charges against Roneks. Petitioners' allegations acknowledge that these prosecutors were "acting within the scope of their employment and duties at all times relative to this complaint." Applying the holding and rationale of *Imbler*, prosecutors White and Atkins unquestionably would be entitled to absolute immunity from § 1983 liability if Roneks were suing them personally. However, recognizing this would occur, Roneks have elected to name only the governmental entity employing White and Atkins, Gallatin County, as a defendant. In light of this Court's holdings that affirm the continuing vitality of absolute prosecutorial immunity, and the reasons for this immunity, we must turn our attention to Gallatin County's right to assert this immunity against Roneks.

This Court has held that local governmental entities may not claim the qualified immunity of their officials in an action against the local government under § 1983. *Owen v. City of Independence,* 445 U.S. 622 (1980). Since the actions of Gallatin County alleged in Roneks' second amended complaint fall within the scope of absolute prosecutorial immunity, a mere qualified immunity based on the objectively reasonable beliefs of prosecutors White and Atkins is not applicable here, and *Owen* therefore does not control whether Gallatin County can claim prosecutorial immunity. Nevertheless, Roneks argue that the

Owen holding should be extended to preclude municipal governments from asserting the absolute immunity enjoyed by their prosecutors as a complete bar to § 1983 liability.

The Court reasoned in *Owen* that municipalities should face liability exposure as a way of equitably spreading losses in the relatively rare instances when a governmental official, albeit in good faith, deprives a person of their constitutional rights, and may assert personal qualified immunity. *Owen,* 445 U.S. at 657. The *Owen* Court's holding did not involve absolute judicial or prosecutorial immunity, nor did it review the entirely different policy considerations underlying those immunities.

One of the most notable distinctions between the quasi-judicial conduct of prosecutors and the actions of other executive branch officials acting outside the judicial system is the frequency with which prosecutorial conduct may engender colorable claims of constitutional deprivation. *See Imbler,* 424 U.S. at 425. Prosecutors make judgment calls on a daily basis that implicate the most cherished constitutional rights of criminal suspects. Exposing the governmental entity which employs a prosecutor to liability for the prosecutor's constitutional torts would divert both the municipality and its prosecutors "from the pressing duty of enforcing the criminal law." *Imbler,* 424 U.S. at 425.

The result sought by Roneks would enfeeble vigorous and courageous law enforcement by prosecutors every bit as much as if they were forced to assume personal liability for constitutional violations. Moreover, such a "strict liability" regimen imposed upon municipalities to defend

the quasi-judicial actions of their prosecutors would impose a crippling financial drain upon government. *See Owen,* 445 U.S. at 658 (Powell, J., dissenting). The resulting disruption of law enforcement would destroy the shield of prosecutorial immunity in § 1983 cases developed by *Imbler* and its progeny.

The court below recognized that imposing damages liability on municipalities for prosecutorial conduct would effectively destroy the doctrine of prosecutorial immunity. The Montana court affirmed the dismissal of both Petitioners' malicious prosecution and § 1983 claims, reasoning that local governments must be immunized from such claims premised on prosecutorial conduct under any theory of recovery. The Montana court relied upon its decision in *State ex rel. Dept. of Justice v. District Court,* 172 Mont. 88, 560 P.2d 1328 (1976), which in turn quoted approvingly from *Creelman v. Svenning,* 67 Wn.2d 882, 410 P.2d 606 (1966), as follows:

> If the prosecutor must weigh the possibilities of precipitating tort litigation involving the county and the state against his action in any criminal case, his freedom and independence in proceeding with criminal prosecutions will be at an end.

State ex rel. Dept. of Justice, 172 Mont. at 92, 560 P.2d at 1330 (quoting *Creelman,* 410 P.2d at 608).

The Montana court, in its decision below, noted the "strong policy reasons for absolute prosecutorial immunity for governmental entities, as well as for personal immunity of the prosecutor," and quoted approvingly from the federal district court decision in *Armstead v. Town of Harrison,* 579 F.Supp. 777 (S.D.N.Y. 1984). *Ronek v. Gal-*

latin County, — Mont. —, 740 P.2d 1115, 1118 (1987). The *Armstead* court reasoned that "[t]he costs to the public from frivolous claims of malicious prosecution, however, are great, and far outweigh the minimal deterrent effect of civil suits on actual prosecutorial misconduct." *Armstead*, 579 F.Supp. at 782. Another federal district court agreed with the position taken by the court below and the *Armstead* court and gave as a primary reason "the considerable frequency with which claims against prosecutors would likely be brought if municipalities were answerable in damages. . . ." *Whelehan v. County of Monroe*, 558 F.Supp. 1093, 1107 (W.D.N.Y. 1983).

Armstead and *Whelehan* are the only federal cases which counsel in this litigation have unearthed that treat the issue of governmental immunity raised by Petitioners. Since both cases conclude that local governments may claim absolute prosecutorial immunity, there is no split of authority in the circuits on this issue. Further, the decision of the Montana Supreme Court below is in harmony with these federal cases. There is therefore no compelling reason for this Court to undertake review of this case. Rule 17.1, S.Ct.R.

Roneks assert that the decision below conflicts with certain recent decisions of this Court, as well as a decision in the Fifth Circuit Court of Appeals. Petition for Writ of Certiorari 5-6. The foregoing argument makes plain that the Montana court's decision, contrary to Petitioners' contention, does not conflict with *Owen v. City of Independence*, supra. Nor does the decision below contradict the holdings of the other cases cited by Roneks.

Roneks cite *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), for the rule that a single incident involving a constitutional violation may establish the existence and execution of a governmental policy by a prosecutor and sheriff, and is therefore sufficient under the rule of *Monell v. Dept. of Social Services of New York,* 436 U.S. 658 (1978), to impose § 1983 liability on a municipality. Petition for Writ of Certiorari 19-21. In *Pembaur,* however, the prosecuting attorney whose decisions created municipal policy was directing the *administrative or investigative* phase of a prosecution in advising deputy sheriffs to break down Pembaur's door to serve the capias. Under the functional analysis of *Imbler v. Pachtman,* this conduct entitled him to only a *qualified* immunity, and therefore entitled the county to no immunity under the rule of *Owen.* Here, in contrast, Roneks' § 1983 claim against Gallatin County is based solely upon prosecutors White and Atkins' *advocatory* conduct in the *judicial* phase of a criminal prosecution, i.e., their quasi-judicial conduct in filing and maintaining criminal charges, for which they personally have *absolute* immunity under the rule in *Imbler.* Thus, *Pembaur* does not support Roneks' contention that Gallatin County cannot claim absolute immunity for their prosecutors' exercise of their quasi-judicial functions, since this Court did not reach the immunity issue in *Pembaur.*

Kentucky v. Graham, 473 U.S. 159 (1985), holds that a successful plaintiff in a § 1983 action may not recover attorney fees authorized under 42 U.S.C. § 1988 from a governmental entity, when the plaintiff only obtains judgment against a government officer personally, but not

against the governmental entity. That is, the Court held that merits liability and fee liability must run together under § 1983.

Roneks quote language in the Court's opinion in *Graham* regarding what defenses to § 1983 liability a governmental entity may interpose—specifically, absolute immunity. Petition for Writ of Certiorari 9. However, the immunity issue was not before the Court in *Graham*. The Court merely took the occasion to illustrate operational differences between personal and official capacity suits, in order to aid courts and counsel in their understanding of these actions. As Petitioners readily admit, *Graham* did not decide any immunity issues, so the language quoted by them is dicta on the prosecutorial immunity issue before this Court. The Montana court's decision below does not conflict with *Kentucky v. Graham*.

Petitioners contend without argument that the holding on the immunity issue by the Montana court differs with *Crane v. Texas*, 759 F.2d 412 (5th Cir. 1985), *on rehearing*, 766 F.2d 193 (5th Cir. 1985). However, a careful analysis of the facts in *Crane* and the court's holding does not support Roneks' assertion. In *Crane*, the district attorney for Dallas County made a county policy which violated the plaintiff's fourth, fifth, and fourteenth amendment rights —the issuance of misdemeanor capias (arrest warrants) on a regular basis without a finding of probable cause by a neutral magistrate. In other words, in *Crane*, the district attorney was writing his own arrest warrants without any judicial review.

The Fifth Circuit Court of Appeals examined this practice as implemented by the district attorney, and found

that "because the ultimate authority for determining County capias procedures reposed in the District Attorney, an elected County official, his decisions in that regard must be considered the official policy attributable to the County." *Crane,* 759 F.2d at 430. The district attorney for the county took no orders on this matter from the state attorney general's office. *Id.* at 429; 766 F.2d at 195. Accordingly, the court held that, since a county official was the final authority or ultimate repository of power in the general conduct of his office and in the particular matter of issuing misdemeanor capias without a judicial determination of probable cause, the county was liable for this unconstitutional policy implemented at the county level.

The *Crane* decision also held that, because plaintiff's § 1983 claim was directed at an official county policy for which the county was properly liable, the district attorney was not liable in his individual capacity. *Crane,* 759 F.2d at 431. The court noted in this connection that, since only the municipal government, not the individual prosecutor, was being sued, the defense of qualified, good faith immunity is not available under the rule in *Owen.* Implicit in this observation by the *Crane* court is that, since the governmental policy under scrutiny, the issuance of misdemeanor capias without a finding of probable cause, would entitle the prosecutor to only a qualified immunity defense rather than the defense of absolute immunity, the county practice at issue is outside the scope of conduct traditionally protected by absolute immunity, that is, quasi-judicial conduct. Thus, *Crane* does not purport to deal with a municipality's ability to claim absolute immunity for its

prosecutor's quasi-judicial conduct. *Crane* thus does not conflict with the holding of the Montana Supreme Court on this issue.

CONCLUSION

As Part I of this brief demonstrates, Gallatin County committed no civil rights violation when it charged Roneks with theft and arrested them pursuant to a valid warrant. Accordingly, this Court should not take this occasion to reach the unresolved immunity issue lurking in this litigation. Since there is no conflict in the circuits on the latter issue, and since the Montana Supreme Court rendered a decision in accordance with what little federal case law exists on the topic, there is no pressing need for this Court to take up the matter at this juncture.

This Court should deny the Petition for Writ of Certiorari on the grounds and for the reasons stated herein.

Respectfully submitted,

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February 24, 1988